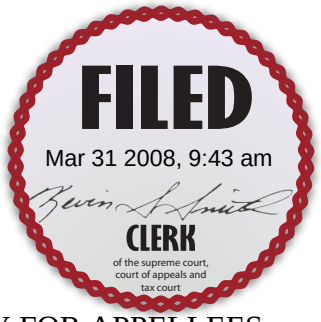

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IN THE
COURT OF APPEALS OF INDIANA

MARLENE MATTOCKS, Personal Representative of the Estate of Darwin Schultz,	)	
Appellant-Defendant,	)	
vs.	)	No. 37A04-0703-CV-154
LARRY ALBANESE and KAREN ALBANESE,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE JASPER SUPERIOR COURT
The Honorable Robert M. Hall, Judge
Cause No. 37D01-0510-MI-383

March 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Marlene Mattocks, as the Personal Representative of the Estate of Darwin Schultz, (the "Estate") appeals the trial court's decision granting judgment in favor of Larry and Karen Albanese ("Albanese") and denying the Estate's counterclaim. The Estate raises three issues, which we restate as:

I. Whether the trial court erred in awarding Albanese damages and denying the Estate's counterclaim;

II. Whether the trial court abused its discretion when it did not allow several of the Estate's witnesses to testify based on Indiana's Dead Man's Statute; and

III. Whether the trial court abused its discretion when it denied the Estate's request for discovery sanctions.

We affirm.

FACTS AND PROCEDURAL HISTORY

In October 2004, Darwin Schultz, who was the sole proprietor of an excavating business, entered into an oral contract with Albanese to remove some trees and cut a basement pad, which consisted of leveling a hill, for a residence to be constructed on the Albanese property. Under the parties' arrangement, Schultz was also to provide backfill around the new residence by using dirt from a pond he was to dig on the property and to spread black dirt from the pond on the yard surrounding the residence. Schultz would receive the remainder of the dirt excavated from the pond as compensation, which would be fulfilled on an ongoing basis as he finished the work. Additionally, Schultz agreed to haul and spread stone for a driveway on the property and receive monetary compensation for the materials used and labor expended. Morgan Wireman ("Wireman"), who assisted Schultz in his business, was present when Schultz and Albanese made this agreement.

Schultz began work on this project, but was diagnosed with cancer and passed away on July 14, 2005. The last work that Schultz performed on the Albanese property was on May 28, 2005. Due to his death, Schultz did not complete the backfilling around the residence nor the spreading of dirt on the yard. Prior to his death, Schultz received as compensation approximately ten loads of dirt to sell. While the work was being done at the Albanese property, Schultz requested that Wireman keep notes on the work completed. After Schultz's death, Daryl Schultz ("Daryl"), his brother, and Ray Mattocks ("Ray"), his brother-in-law, requested a copy of the notes taken by Wireman. These notes were not intended to be a bill to Albanese.

On October 3, 2005, the Estate caused a mechanic's lien to be filed on the Albanese property. On October 7, 2005, Albanese served the Estate with a written demand to release the mechanic's lien, which the Estate refused to do. As a result of the mechanic's lien against the property, Albanese was unable to obtain a loan needed to open a business. Consequently, Albanese filed a slander of title action against the Estate, and the Estate filed a counterclaim seeking damages for foreclosure of its mechanic's lien, breach of contract, account stated, unjust enrichment, and quantum meruit. After a bench trial, the trial court entered judgment in favor of Albanese and denied the Estate's counterclaim. The Estate now appeals. Additional facts will be added as necessary.

DISCUSSION AND DECISION

I. Mechanic's Lien

When a trial court enters findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A), we apply the following two-tiered standard of review: (1) whether the evidence supports the findings and (2) whether the findings support the judgment. *Fields v. Conforti*, 868 N.E.2d 507, 512 (Ind. Ct. App. 2007); *In re Guardianship of Knepper*, 856 N.E.2d 150, 153 (Ind. Ct. App. 2006), *trans. denied*. We will set aside the trial court's findings and conclusions only if they are clearly erroneous. *Fields*, 868 N.E.2d at 512; *In re Knepper*, 856 N.E.2d at 153. Findings are clearly erroneous when the record contains no facts to support them directly or by inference. *Fields*, 868 N.E.2d at 512. A judgment is clearly erroneous if it relies on an incorrect legal standard. *Id*. "We give due regard to the trial court's ability to assess the credibility of witnesses." *Id*. We do not reweigh the evidence, and we consider the evidence most favorable to the judgment and all reasonable inferences drawn therefrom. *Id*. (citing *Yoon v. Yoon*, 711 N.E.2d 1265, 1268 (Ind. 1999)). We review the trial court's conclusions *de novo*. *In re Knepper*, 856 N.E.2d at 153.

The Estate argues that the trial court erred in awarding damages to Albanese and in denying its counterclaim. Specifically, the Estate contends that the trial court erred when it concluded that the last work performed on the Albanese property was on May 28, 2005 and that the mechanic's lien was not timely filed. The Estate claims that the last work performed was actually on August 5 and 7, 2005, and therefore, the mechanic's lien was timely filed. Additionally, the Estate argues that the trial court erroneously concluded that the agreement

between Schultz and Albanese was personal and terminated on Schultz's death and that the agreement did not include rental or lease of equipment by Albanese from Schultz.[1]

A mechanic's lien was a remedy unknown at common law and is purely a statutory creation. *Cho v. Purdue Research Found.*, 803 N.E.2d 1161, 1169 (Ind. Ct. App. 2004). "Because the mechanic's lien is purely a creature of statute, the burden is on the party asserting the lien to bring itself clearly within the strictures of the statute." *Id*. A notice of intention to hold a mechanic's lien must be filed with the county recorder within sixty days after performing labor or furnishing materials or machinery. IC 32-28-3-3(b).

Here, the evidence showed that an agreement was made between Schultz and Albanese for Schultz to dig a pond and receive the dirt therefrom, after he used whatever dirt was necessary to backfill around the Albanese residence and spread over the yard. This agreement was to be fulfilled on an ongoing basis as Schultz completed the work. Wireman, who performed some work for Schultz at the Albanese property, was present when the agreement was made and testified that, under the agreement, Schultz was to receive the dirt from the pond once the backfill and yard were completed. *Tr*. at 181. No evidence was

[1] The Estate also contends that Albanese is estopped from arguing that the Estate was required to file a mechanic's lien. This is because a mechanic's lien is not required to be filed where a property owner will not accept lienable work as completed and refuses to pay for same until satisfactory corrective work has been done. *Gooch v. Hiatt*, 166 Ind. App. 521, 525, 337 N.E.2d 585, 588 (Ind. Ct. App. 1975). Additionally, when a party refuses to make final payment because the work is allegedly incomplete, that party is later estopped from claiming that the work was completed prior to the additional work and that the lien was untimely filed. *Smith v. Brunung Enters. Inc.*, 424 N.E.2d 1035, 1037 (Ind. Ct. App. 1981). Here, Albanese did not refuse to pay because the work was incomplete, but because they claimed that they had paid for the work already completed, and that no other payment was due. Therefore, Albanese is not estopped from arguing that the mechanic's lien was not timely filed.

presented to show that Albanese was to pay Schultz for the use or rental of Schultz's equipment.

Schultz began to dig the pond and use the dirt to backfill around the Albanese residence, but was unable to complete the work because of his death on July 14, 2005. The last work performed on the Albanese property by Schultz under the agreement, which consisted of hauling dirt to backfill and spread around the residence, was on May 28, 2005. *See Ex*. 8. The Estate filed a mechanic's lien against the Albanese property on October 3, 2005, which was 128 days after the last work was performed on the property. The evidence supports the conclusion that the mechanic's lien was not timely filed because it was not done within sixty days after the last work was performed.[2] Therefore, Albanese's request for release of the mechanic's lien should have been honored, and because it was not, Albanese was entitled to damages for slander of title.

The Estate's arguments that further work was performed on the Albanese property on August 5 and 7 of 2005 and that Albanese was to pay Schultz for the use of his equipment are an invitation to reweigh the evidence, which we cannot do on review. *Fields*, 868 N.E.2d at 512. The Estate also contends that the testimony of Albanese was contradictory and against

[2] The Estate also argues that it had ninety days within which to file the mechanic's lien pursuant to IC 32-28-3-3(a). This subsection states that a person must file a mechanic's lien within ninety days "after performing labor or furnishing materials or machinery." IC 32-28-3-3(a). Subsection (b) of the statute requires a lien to be filed within sixty days "after performing labor or furnishing materials or machinery" if the work was performed on a Class 2 structure or the real estate auxiliary to a Class 2 structure. IC 32-28-3-3(b). A Class 2 structure is defined as "[a] building or structure that is intended to contain or contains only one . . . dwelling unit or two . . . units unless any part of the building or structure is regularly used as a Class 1 structure" and includes an outbuilding for such a structure. IC 22-12-1-5. Because the Albanese property satisfies the definition of a Class 2 structure, a mechanic's lien was required to be filed within sixty days after work was performed. Regardless of which subsection applies, the lien was not timely filed, as it was filed 128 days after Schultz performed the last work.

logic. This is merely a request to judge the credibility of the witnesses, which we also cannot do on review. *Id*.

Additionally, the Estate contends that the following two findings by the trial court were erroneous:

> 26.) Sam Wireman estimated the cost of moving Six Hundred Twenty-Five (625) Loads of dirt from the pond [Schultz] was digging to the Albanese house was One Thousand Nine Hundred Dollars ($1,900.00) or Three Dollars and Four Cents ($3.04) per load.
>
> 27.) [Schultz] moved Two Hundred Seventy-Eight (278) loads of dirt to the Albanese property and the Fair Market Value of the same was Eight Hundred Forty-Five Dollars and Twelve Cents ($845.12).

Appellant's App. at 14. The Estate is correct that the evidence does not support these findings because Sam Wireman did not testify that the cost of moving 625 *loads* of dirt would be $1,900.00; instead he testified that this was the cost to move 625 *yards* of dirt. *Tr*. at 38-39. There are sixteen yards in a load. While the evidence may not have supported these findings by the trial court, the Estate also mischaracterizes the evidence when it states, "As Sam Wireman testified that the typical charge to dig and dump sand around a residence is $1,900.00 per 100 yards (or $19.00 per yard), the value of [moving 268 loads of sand around the Albanese residence] would have exceeded $80,000.00."[3] *Appellant's Br*. at 20. Sam Wireman actually testified that he would charge $1,900.00 to move 625 yards of dirt a distance of 100 yards. *Tr*. at 38-39. Notwithstanding these findings, we do not find the trial court's judgment clearly erroneous, as it was supported by sufficient other findings. *See*

Atterholt v. Robinson, 872 N.E.2d 633, 639 (Ind. Ct. App. 2007) ("[T]he judgment is clearly erroneous if it is unsupported by the findings and conclusions thereon."). Our review of the facts and circumstances supports the trial court's determination that Albanese is entitled to judgment against the Estate and that the Estate is not entitled to judgment on its counterclaim. We therefore decline to set aside the judgment entered against the Estate.

II. Dead Man's Statute

The Estate argues that the trial court misapplied Indiana's Dead Man's Statute, IC 34-45-2-4,when it precluded the Estate's witnesses from testifying on behalf of the Estate regarding conversations those witnesses had with Schultz concerning his agreement with Albanese. The Estate contends that the trial court improperly disallowed the witnesses from testifying because the witnesses' interests were not adverse to the Estate. Because these witnesses were improperly precluded from testifying, the Estate claims that it was severely prejudiced in the presentation of its evidence.[4]

Indiana's Dead Man's Statute provides in pertinent part:

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[3] The Estate bases the 268 loads on the testimony of Morgan Wireman, who testified that Schultz dumped approximately that number of loads of sand around the Albanese residence. *See Tr*. at 183. The Estate calculated the $80,000.00 as follows: 268 loads multiplied by 16 yards per load, which equals 4,288 yards at $19.00 per yard, totaling $81,472.00. *Appellant's Br*. at 20.

(a) This section applies to suits or proceedings:

(1) in which an executor or administrator is a party;

(2) involving matters that occurred during the lifetime of the decedent; and

(3) where a judgment or allowance may be made or rendered for or against the estate represented by the executor or administrator.

. . . .

(d) Except as provided in subsection (e), a person:

(1) who is a necessary party to the issue or record; and

(2) whose interest is adverse to the estate;

is not a competent witness as to matters against the estate.

(e) In cases where:

(1) a deposition of the decedent was taken; or

(2) the decedent has previously testified as to the matter;

and the decedent's testimony or deposition can be used as evidence for the executor or administrator, the adverse party is a competent witness as to any matters embraced in the deposition or testimony.

IC 34-45-2-4.

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[4] Albanese argues that the Estate has waived this argument because it failed to preserve the issue for review as it did not make an offer of proof on the record. Generally, the proponent of excluded testimony must make an offer of proof to preserve the ruling for appellate review. *Lumbermens Mut. Cas. Co. v. Combs*, 873 N.E.2d 692, 718 (Ind. Ct. App. 2007), *trans. denied* (quoting *Yoon v. Yoon*, 687 N.E.2d 201, 205-06 (Ind. Ct. App. 1997), *aff'd in relevant part*, 711 N.E.2d 1265 (Ind. 1999)). The failure to make an offer of proof results in waiver of the asserted evidentiary error. *Court View Centre, L.L.C. v. Witt*, 753 N.E.2d 75, 85 (Ind. Ct. App. 2001). However, "[w]e have previously held that '[w]here the objection is to the right of the witness to testify at all, the party introducing such witness need not state what he expects to prove, because the question for the trial court to decide is not as to the competency of the testimony, but the competency of the witness himself.'" *Kalwitz v. Estates of Kalwitz*, 759 N.E.2d 228, 233 n.5 (Ind. Ct. App. 2001), *trans. denied* (quoting *Senff v. Estate of Levi*, 515 N.E.2d 556, 559 (Ind. Ct. App. 1987), *trans. denied*). Therefore, the Estate was not required to make an offer of proof to preserve this issue on review.

Generally, when the executor or administrator of an estate is a party to an action, the adverse party is not competent to testify about transactions that took place during the lifetime of the decedent. *In re Estate of Lambert*, 785 N.E.2d 1129, 1132 (Ind. Ct. App. 2003), *trans. denied*. The purpose of this statute is to protect the decedent's estate from spurious claims. *Morfin v. Estate of Martinez*, 831 N.E.2d 791, 798 (Ind. Ct. App. 2005). "The Dead Man's Statute guards against false testimony by a survivor by establishing a rule of mutuality, wherein the lips of the surviving party are closed by law when the lips of the other party are closed by death." *In re Estate of Lambert*, 785 N.E.2d at 1132. The Dead Man's Statute addresses the competence of a witness, not the competence of that witness's testimony. *Estate of Hann v. Hann*, 614 N.E.2d 973, 977 (Ind. Ct. App. 1993). Where the trial court rules on witness competency, the ruling will not be reversed absent a clear abuse of discretion. *Kalwitz v. Estates of Kalwitz*, 759 N.E.2d 228, 232 (Ind. Ct. App. 2001). An abuse of discretion will be found when the ruling is against the logic and effect of the facts and circumstances before the trial court. *Id*.

The Estate argues that the trial court abused its discretion when it excluded its witnesses from testifying based upon the Dead Man's Statute, specifically contending that the witnesses did not have interests adverse to the estate. "An adverse interest that would render a witness incompetent is one by which the witness will gain or lose by the direct, legal operation of the judgment." *Morfin*, 831 N.E.2d at 798. "'The interest must be real, present, certain, and vested; a bias or sentiment is not sufficient to cause a witness to be incompetent.'" *Id*.

Here, the Estate believes that the following witnesses were improperly excluded from testifying pursuant to the Dead Man's Statute: Wireman; Jerry Bruntin; Ray; and Daryl. As to Wireman, on direct examination, the Estate attempted to have him testify regarding what Schultz thought was the value of the black dirt, and Albanese objected pursuant to the Dead Man's Statute, which was sustained. *Tr*. at 183. Assuming without deciding that this was not proper because Wireman did not have an interest adverse to the Estate, the trial court did not abuse its discretion when it excluded Wireman from testifying because it also sustained the objection under hearsay grounds. *Id*. at 183-84. As to Bruntin, the Estate also attempted to have him testify about Schultz's belief regarding the contract with Albanese, to which Albanese objected. *Id*. at 198. The trial court sustained this objection again under hearsay grounds and, therefore, did not abuse its discretion by applying the Dead Man's Statute to this witness. *Id*. at 198-99. When Ray, who was Schultz's brother-in-law, testified, the Estate attempted to ask him if Schultz ever talked to him regarding Schultz's belief that he was entitled to the black dirt. *Id*. at 219. Albanese objected under the Dead Man's Statute, and the trial court sustained this objection. This was not an abuse of discretion as Ray himself, or at least through his wife, stood to gain or lose by the direct, legal operation of the judgment and therefore, pursuant to IC 34-45-2-4 (d)(2), had an interest adverse to the Estate. *See Morfin*, 831 N.E.2d at 798. The same holds true for Daryl, who was Schultz's brother. We conclude that the trial court did not abuse its discretion in disallowing the Estate's witnesses from testifying.

III. Discovery Sanctions

A trial court has broad discretion in ruling on discovery issues, and we will not reverse a decision regarding such unless it is apparent that the trial court abused its discretion. *Poulard v. Lauth*, 793 N.E.2d 1120, 1125 (Ind. Ct. App. 2003) (citing *Childress v. Buckler*, 779 N.E.2d 546, 554 (Ind. Ct. App. 2002)). It is also within the trial court's discretion to decide which sanction to impose for a failure to comply with discovery matters. *Id*.

The Estate argues that the trial court abused its discretion when it denied the Estate's request for discovery sanctions against Albanese. The Estate requested discovery sanctions because Albanese through the advice of counsel refused to answer several questions during depositions based upon the Dead Man's Statute. The Estate contends that, as a result of Albanese's refusal to answer these questions, it was prejudiced because it was precluded from conducting discovery and incurred unnecessary costs in preparation of the depositions.[5]

Although Albanese did refuse to answer several questions posed by the Estate at the depositions, we do not agree that this precluded it from conducting discovery. Even with the refused questions, the Estate was still able to conduct extensive depositions of both Larry and Karen Albanese. Additionally, Albanese answered interrogatory questions regarding the same topics pursued in the refused deposition questions. The Estate was therefore not prejudiced, and the trial court did not abuse its discretion in denying the Estate's request for discovery sanctions.

Affirmed.

[5] In its Appellant's Brief, the Estate also argues that the trial court abused its discretion when it allowed the testimony of two of Albanese's witnesses at trial who were not previously disclosed to the Estate. We do not address this as the Estate withdrew its argument in its Reply Brief after discovering that the witnesses were disclosed in Albanese's Supplemental Responses to Interrogatory Questions. *Reply Br*. at 15.

RILEY, J., and MAY, J., concur.